

DOCKET FILE COPY
ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC MAIL SECTION

Nov 18 3 20 PM '93

MM Docket No. 93-291

In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include
Lawrence, Massachusetts in the
Boston - Cambridge - Worcester,
Massachusetts, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1993; Released: November 18, 1993

Comment Date: December 28, 1993

Reply Comment Date: January 12, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed April 30, 1993, and a supplement thereto filed August 16, 1993, by MFP, Inc., licensee of television station WMFP(TV), Channel 63 (Independent), Lawrence, Massachusetts ("MFP" or "Petitioner") to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the "Boston-Cambridge-Worcester, Massachusetts" television market to "Boston-Cambridge-Lawrence-Worcester, Massachusetts." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. See 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is

based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."¹

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),² which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.³ The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In its petition, MFP asserts that the current "Boston-Cambridge-Worcester" market designation contained in Section 76.51 of the Commission's Rules does not accurately reflect the reality of the area television market. It notes that Station WMFP was not operational in 1972 when the Commission adopted the Section 76.51 market listings, and hence Lawrence was not included in the Boston-Cambridge-Worcester market. It maintains, however, that WMFP is today part of the "Boston (Derry & Manchester, N.H. & Worcester, Mass.)" ADI, the sixth largest, as designated by Arbitron.⁴ Moreover, MFP notes that Law-

¹ See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See, also, *Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

² Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³ In connection with the implementation of the broadcast signal carriage ("must-carry") provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider fur-

ther revisions to the list of television markets on a case-by-case basis, delegating authority to act on such petitions to the Chief, Mass Media Bureau. See *Report and Order* in MM Docket No. 92-259, *supra*, hereinafter referred to as the "Must-Carry Order."

⁴ According to information submitted by the petitioner, in addition to Station WMFP(TV), Arbitron includes the following other commercial television stations in the subject ADI: WBZ-TV, Channel 4 (NBC); WCVB-TV, Channel 5 (ABC); WHDH-TV, Channel 7 (CBS); WFXT(TV), Channel 25 (Fox); WSBK-TV, Channel 38 (Independent); WQTV(TV), Channel 68 (Ind.), Boston; WLVI-TV, Channel 56 (Ind.), Cambridge; WUNI(TV), Channel 27 (Ind.), Worcester; silent station

rence is an integral part of the "Boston-Lawrence-Salem, MA/NH" Consolidated Metropolitan Statistical Area (CMSA) in the 1990 U. S. Census.⁵

6. The petitioner further states that although the city of Lawrence is some 25 miles north of Boston,⁶ WMFP competes for audience, programming and advertising revenue in the same areas as other market stations. It notes that the station's transmitter is located in downtown Boston, and that WMFP's Grade A and Grade B contours, which fall entirely within the Boston ADI, "conform closely" with the contours of other television stations licensed to the communities in the Boston market.⁷ The petitioner also states that Lawrence is within the Grade A contour of nine other stations in the market.⁸ As additional evidence of the commonality of the market within which these stations compete, MFP states that it pays the same Boston market rates for programming as other area stations and, due to the close proximity of Lawrence to Boston, it cannot acquire the same syndicated programming available to more distant ADI stations at lower rates.⁹ Moreover, it maintains that area media treat Boston and Lawrence as in the same television market.¹⁰

7. MFP contends that despite the fact that WMFP directly competes with other market stations for audience, programming and advertising, the station does not share the same access to viewers enjoyed by the other stations. Specifically, the petitioner asserts that although WMFP is entitled to carriage on cable systems in the Boston-Cambridge-Worcester ADI under the Commission's new must-carry rules,¹¹ the absence of Lawrence as a designated community in this hyphenated market in the Section 76.51

listings results 8 in the station being considered a "distant signal" for purposes of compulsory copyright liability if carried on certain cable systems further than 35 miles from Lawrence.¹² MFP asserts that, unlike its competitors, it would be liable for increased copyright fees as a condition of carriage of WMFP by cable operators outside the station's 35 mile zone, but well within the ADI. It contends that this places WMFP at a competitive disadvantage to stations licensed to designated communities in the Boston-Cambridge-Worcester market, all of which are "local signals" not subject to copyright liability.¹³

8. Thus, the petitioner maintains that amendment of Section 76.51 as requested is essential to equalize competition among local television stations in the subject ADI. It suggests that WMFP, while in direct competition with other area stations, will then have equal access to viewers, allowing it to offer advertisers similar access to all broadcast and cable viewers in the market. In addition, MFP asserts that amendment of the existing market will provide market-area viewers equal access to WMFP's programming, including the almost 22 hours a week of "secondary" NBC programming currently scheduled to be offered by the station and unavailable from other market stations. For these reasons, the petitioner maintains that amendment of Section 76.51 of the Rules is necessary to relieve WMFP's competitive disadvantage, and to facilitate a competitive balance within the market in which it competes in a manner consistent with existing market realities.

WHRC(TV), Channel 46 (Ind.), Norwell; and WSHH(TV), Channel 66 (Ind.), Marlborough, Massachusetts; WMUR-TV, Channel 9 (ABC), Manchester; silent station WNHT(TV), Channel 21 (Ind.), Concord; WNDS(TV), Channel 50 (Ind.), Derry; and WGOT(TV), Channel 60 (Ind.), Merrimack, New Hampshire.

⁵ The petitioner states that the "Lawrence-Haverhill MA-NH" Primary Metropolitan Statistical Area (PMSA) is the second most populous PMSA (after Boston) of the six PMSAs in the Boston-Lawrence-Salem CMSA. It maintains that, in contrast, Worcester, which is further from Boston than Lawrence, is the principal community in its U.S. Census Metropolitan Statistical Area, which is not part of the Boston-Lawrence-Salem CMSA. MFP presumes Worcester is included as a community in the market as designated in Section 76.51 simply because WUNI(TV), Worcester, began operation prior to 1972 when the market list was adopted, whereas Lawrence was not included in that list because there was no station licensed to that community at that time.

⁶ In this regard, MFP points out that Lawrence is closer to Boston than are Worcester or the New Hampshire communities with stations included in the subject ADI.

⁷ In fact, it appears from the information submitted by the petitioner that while WMFP's signal contours resemble the same basic shape of those of most market stations, the station's service area is smaller and its signal contours are contained within the larger Grade B signal areas of those other market stations.

⁸ The petitioner specifically states that Lawrence receives Grade A or better service from all the Massachusetts stations operating in the market.

⁹ Section 73.658(m) of the Commission's Rules provides that no television station may acquire the exclusive rights to syndicated programming against other stations licensed to a community over 35 miles distant, unless the communities are both designated communities in a hyphenated market listed in Section 76.51 of the Rules.

¹⁰ In this regard, the petitioner references the program guides of the Lawrence cable system and *The Boston Globe*, which list, among others, the operating Boston ADI stations.

¹¹ See Section 76.56(b) of the Commission's Rules.

¹² Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Lawrence as a designated community in this market list generally results in WMFP's classification as a "distant signal" for market-area cable systems more than 35 miles from Lawrence. Moreover, we note that Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

¹³ One specific example given of WMFP's competitive disadvantage is its unavailability in 12 towns served by Nashoba Cable which carries WMFP's competitors but does not carry WMFP because one, or perhaps two, of its franchise towns (Ashby and Ashburnham, Massachusetts) are outside or partly outside WMFP's 35 mile zone. While the other communities served by this cable system are well within the Lawrence 35 mile zone, including some populous towns close to Lawrence and Boston such as Belmont; amendment of Section 76.51 to add Lawrence as a designated community in this hyphenated market, Nashoba Cable could provide WMFP service to all 12 towns without incurring distant signal copyright liability.

DISCUSSION

9. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that Station WMFP(TV) and stations licensed to communities in the Boston-Cambridge-Worcester television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.¹⁴

ADMINISTRATIVE MATTERS**Ex Parte Rules -- Non-Restricted Proceeding**

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 28, 1993**, and reply comments on or before **January 12, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the

Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, at (202) 652-7792 or James A. Hudgens, Office of Plans and Policy, at (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

¹⁴ Although we believe this proposal merits testing through the rulemaking process, the adjustment sought affects a particularly large television market, the nation's sixth largest. In a separate proceeding, the Commission is examining alternatives to market hyphenation to more accurately reflect the true level of competition among specific stations in a large ADI market area. See

Notice of Proposed Rulemaking in MM Docket No. 93-290 (Newton, New Jersey and Riverhead, New York), DA 93-1349, (adopted November 4, 1993). Interested parties may wish to address the issues raised in that proceeding in relation to the instant proposal.